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No. 87-2096

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

OAHU GAS SERVICE, INC.,
Petitioner,

VS.

PACIFIC RESOURCES INC. and GASCO, INC.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

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LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES PURSUANT TO RULE 28.1

Pacific Resources, Inc.
- Gasco, Inc.
- Enerco, Inc.
- PRI Energy Systems, Inc.
- Promana, Inc.
- Hawaii Energy Resources, Inc.
  - Hawaiian Independent Refinery, Inc.
  - PRI International, Inc.
  - PRI Northwest, Inc.
  - Pacific Resources Terminals, Inc.
  - Petroterm, Inc.
- International Solarpanel, Inc.
- PRI Marine, Inc.
- PRI South Pacific, Inc.
  - South Pacific Resources, Inc.
  - Triad Pacific Petroleum Limited
  - Tonga Pacific Limited
  - Trans Pacific Resources (Fiji) Ltd.
- Mid Pacific Resources, Inc.
  - Paramount Petroleum Corporation
- Energy Factors, Incorporated
- PRI ASIA PTE LTD.
- PRI Eastern Limited
- PRI International Limited
  - PRI Finance Limited
  - PRI Pacific Limited
    - Societe Polynesienne de Distribution D'Hydrocarbures
  - ASIAN PACIFIC RESOURCES SDN BHD
- P.R.I.N. Limited
  - Pacific Resources (Liberia) Limited
  - Pacific Resources Limited
    - Brewer Pacific Agronomics Co.
- Pacific Energy Resources, Inc.
  - Pacific Texas Resources, Inc.
- PRI Leasing, Inc.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petition for Certiorari ("Petition") presents a question for review that is entirely fact specific, relating to the individual "circumstances" of this case, and raises no important issue of law that is worthy of consideration by this Court. We accept the question as stated. However, the statements of facts and proceedings before the Court of Appeals are incomplete and inaccurate. We set forth below a statement of uncontroverted facts supported by references to the record before the Court of Appeals and a summary of the proceedings below.[1]

[1] The record references are to the record before the Court of Appeals. We cite the Appendix to the Petition as "App. A", etc. and the Appendix to this brief as "App. 1", etc. Emphasis is added in quoted matter unless otherwise stated.

I

STATEMENT OF FACTS

A. The Parties

Respondent Gasco, Inc. ("Gasco") is the wholly owned subsidiary of Respondent Pacific Resources, Inc. ("PRI") (C.R. 265, p.6). Gasco is, and has been since the 1950's, engaged in the retail distribution and sale of propane and SNG in Hawaii (RT3:67, 13:13). Petitioner Oahu Gas Service, Inc. ("OGS") was formed in late 1972 by a former officer and director of Gasco and PRI, James Fransden, to engage in the distribution and sale of propane on the Island of Oahu (C.R. 265, pp.8-9).

B. The Propane Markets

Prior to 1982, Standard Oil Company of California ("Chevron") was the sole manufacturer of propane in Hawaii, and prior to 1972, Chevron operated the only petroleum refinery in Hawaii (RT13:13). At all relevant times, Chevron and the federal government have dominated wholesale propane sales in Hawaii (App. C, p.20). In 1972 PRI's subsidiary, Hawaiian Independent Refinery, Inc. ("HIRI"), completed construction of, and introduced into commercial operation, a small refinery on Oahu for manufacture of petroleum products, not including propane. As discussed below, HIRI considered entering the wholesale propane market by adding a propane unit to its refinery prior to the initiation of federal price control in late 1973, but delayed that investment until 1982 after the end of price control.

Chevron was for many years the major retail distributor of propane in Hawaii. Chevron withdrew from that business in the 1950's and thereafter sold propane to Gasco, which became the sole retail distributor of propane in Hawaii until the entry of OGS in 1972. (RT3:67, 13:13.) OGS was conceived to target Gasco's large commercial, industrial and multi-family unit customers on the Island of Oahu. Frandsen recognized that these large volume propane users, as compared to residential users, required less handling, less investment and were the "key to this type of business and always will be" (RT9:142). As the Petition states (p.4), "Chevron encouraged James Frandsen to form OGS, and

eventually contracted with OGS for propane supplies" (Exs. 958, 2074). As Frandsen testified, "they [Chevron] had already established the fact that they were going to have a second distributor out here" (RT9:99). OGS did not enter the less lucrative propane distribution business on the Neighbor Islands of Hawaii, where Gasco continued to be the sole propane distributor. After its entry in 1972, OGS increased market share every year. By 1983 OGS had 30% of propane retail sales on Oahu (RT4:155-56; Ex. 1318) and 78% of the sub-market of large commercial and industrial users (RT3:68-69). A third retail propane marketer, Aloha Gas, commenced operations on Oahu in 1983 (RT12:107-08).

C. Federal Government Regulation

The Emergency Petroleum Allocation Act was enacted in November 1973, governing petroleum prices and supply relationships. The federal government (ultimately through the Department of Energy ("DOE")) exercised complete control over both propane prices and the allocation of propane supplies until 1981 with the purpose and effect of displacing "normal market forces" (RT14:193, 194, 198).[2]

The federal regulations superseded the contractual supply relationship between Chevron and its customers, Gasco and OGS. In place of a contractual supply commitment from Chevron, DOE assigned OGS an allocation of a portion of Chevron's supply to Gasco during the base period (RT14:205-6). Because price controls made propane production less profitable than using the components of propane to produce other products, Chevron limited its production of propane to the minimum required by DOE. (*E.g., Gasco Inc*, 1 FEA ¶ 20,724 (Dec. 6, 1974).) Gasco was not able to obtain the quantity of Chevron propane necessary to supply its customers and imported foreign propane at a significantly higher cost (RT2:78). OGS obtained all of its supplies

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[2] 15 U.S.C. § 751 *et seq.* (1973); 10 C.F.R. Part 211 (Mandatory Petroleum Allocation Regulations) and Part 212 (Mandatory Petroleum Price Regulations).

from Chevron and enjoyed a cost advantage over Gasco.[3] This cost advantage permitted OGS's business to grow at an even more rapid rate than OGS predicted in its initial business projections (RT9:168-69, 15:84-86; Exs. 2120, 2149, 2191).

Even with its rapid growth and cost advantage, OGS did not utilize all of the propane made available to it by Chevron under the regulations until 1976 (Exs. 2633, 2822). Over the next six years, OGS petitioned DOE on numerous occasions seeking an order requiring Chevron to provide more propane to OGS. Gasco opposed OGS's requests on the ground that providing OGS with a greater percentage of the low price Chevron propane would only require Gasco to import greater quantities of more expensive foreign propane and thus increase the cost advantage that OGS already enjoyed. Based primarily on this reasoning, the DOE regularly denied OGS's requests.[4] Finally, in July, 1979, DOE increased OGS's supply of domestic propane on the condition that OGS pay an amount necessary to offset partially the additional costs Gasco would incur to import more foreign propane.[5]

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[3] Mr. Frandsen admitted, as the DOE had determined, that OGS enjoyed a competitive advantage over Gasco in the cost of propane because OGS purchased only price controlled domestic propane from Chevron while Gasco purchased additional supplies at higher prices on the world market (RT12:107-08). The DOE stated (Ex. 110, p.7):

> Since OGS purchases only the lower cost domestic propane, its product cost is considerably less than Gasco's product costs. . . .

[4] In its Order dated September 20, 1978, the DOE stated (Ex. 97, p.6):

> OGS enjoys a substantial cost advantage over Gasco, a cost advantage which would certainly be increased by the approval of an increased base period allocation to OGS.
>
> • • •
>
> However, consumers will not necessarily benefit from "competition" in a market in which one firm enjoys a particular advantage.

[5] Ex. 97, pp.26-27. The $163,108 OGS paid in accordance with this DOE order was awarded trebled to OGS as damages as the "World Price Adjustment." OGS also was awarded as damages the $375,000

D. Modification of HIRI's Refinery

The government regulatory program also played a decisive role in HIRI's consideration of adding a propane recovery unit to its refinery in the mid-1970's. The HIRI refinery, which had commenced operations in 1972, was constructed to produce fuels for military uses. In early 1973, HIRI began to consider possible refinery modifications, including installation of new equipment to permit production of gasoline and commercial grade propane. HIRI commissioned both internal and external studies of these possibilities. (RT13:92, 99-100.) In 1973, HIRI anticipated that the refinery modifications would be completed by 1976 and that Gasco would be the primary purchaser of the new propane (Exs. 243, 381).

The 1973-74 government regulations, enacted after the Arab oil embargo in September 1973, impacted HIRI's plans by fixing a maximum wholesale price that could be charged by a refiner for propane. Since HIRI had never before produced propane, the price HIRI could charge would be determined under the "New Item Rule" (10 C.F.R. § 212.11), which limited HIRI to Chevron's maximum price for propane in Hawaii. (RT14:216-217.)[6]

The government ceiling price dramatically altered the economic viability of the proposed HIRI investment. As Joseph Pelletier, Executive Vice President of PRI, testified (RT13:101-02):

> The effect on our propane unit was that as we analyzed the cost, the investment we would have to put in . . . and we looked at and determined through contacts with the Department of Energy . . . what the pricing might be that we could

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which Mr. Frandsen "estimated" OGS spent in the various proceedings before the DOE.

[6] For refiners such as Chevron and HIRI the calculation of maximum ceiling prices it could charge for gasoline and propane were calculated under two separate and different formulas. Compare Subpart K, 10 C.F.R. § 212.161 *et seq.* (Mandatory Petroleum Price Regulations—Natural Gas Liquids) with Subpart E, 10 C.F.R. § 212.81 *et seq.* (Mandatory Petroleum Price Regulations—Refiners).

> sell that propane from the refinery, we found out that it was not economical.
>
> In fact, we'd have to make an investment in which we'd have a negative return on it. And so it just did not make sense to us to go ahead and proceed with it at that time.

Propane production was also uneconomic for Chevron, which was, nonetheless, required by DOE regulations to continue propane production and sale at regulated prices (Ex. 2656). However, HIRI was not required by DOE to *construct* a propane production unit and to *commence* propane production, and HIRI postponed its plans to do so in the interest of avoiding production of an uneconomic product. Mr. James Gary, the President and Chairman of PRI as well as President of HIRI, confirmed that propane production by HIRI did not make economic sense (RT:5:85):

> [I]t appeared that we would be tied to what Standard of California, for the allocation period, was being required to sell propane for also. And there's no way you could build a new facility and charge the Standard of California price and make the thing pay.

The foregoing evidence was uncontroverted. At trial, OGS did not dispute this evidence but elected instead to attack defendants' "lack of morality" in allowing Chevron to be saddled alone with the obligation of refining a commodity on which it was losing money. (RT18:152.)

Defendants acknowledged that HIRI would be required to sell propane to OGS if it made the investment to produce propane.[7] This was cited by OGS as "evidence" that HIRI's intent was to "starve" OGS. However, since HIRI modified its refinery and

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[7] (RT7:165; Exhibits 776, 778, 550.) There was no evidence that HIRI ever tried to avoid any obligation to supply OGS. To the contrary, PRI's Chairman, Mr. James Gary, testified that HIRI was prepared to supply propane to others (RT5:86-87.) He later reiterated that HIRI would "sell to them [OGS] today. In fact, I think we've offered to at one point or another" (RT5:90). OGS has never even asked to purchase HIRI propane (RT13:122).

commenced propane production in 1982 after the end of price controls in 1981, it has sold propane to Aloha L.P. Gas, a new entrant, to Gasco, and has expressed willingness to sell to OGS (RT6:87-89).

E. Gasco's 1982 Marketing Program

In late 1981 with the end of federal regulation, propane became more plentiful, and Gasco was beset by declining sales volume resulting from the installation of alternative energy devices such as electric heat pumps and solar powered water heating systems.[8] In response to these changing conditions, Gasco undertook a market analysis and developed a pricing and marketing strategy to compete with the substitute energy sources and with OGS for the high volume commercial and industrial users.

In March and April, 1982, Gasco sent more than 300 letters to present and potential industrial and commercial users of propane, including some being supplied under long term contracts with OGS, offering long term contracts at reduced prices (Exs. 2812, 2813; RT7:50-57). *OGS conceded at trial that the prices offered by Gasco were above Gasco's average total costs of supplying propane.*[9]

In response to Gasco's offers, OGS immediately instituted what it called a "temporary voluntary allowance" or "TVA," reducing its price to each of its contract customers (RT9:189-90).[10] As a result of the TVA, none of the OGS customers accepted Gasco's proposed contract, although all of them bene-

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[8] *E.g.*, Exhibit 2808. Gasco lost 2 to 3 million gallons of propane sales, approximately 10% of its business, to heat pumps between 1980 and 1985. (RT2:160-161.)

[9] OGS's assertion in its complaint that the prices offered by Gasco were below cost as well as its claims that these offers violated the Robinson-Patman Act and Hawaii state law were abandoned at trial (C.R. 310, 341).

[10] Mr. Fransden's unsupported conclusory testimony that the TVA's "almost" forced OGS into bankruptcy was belied by the fact that OGS was profitable throughout the period at issue (RT9:168-69; Ex. 662, p.33).

fited from the lower prices resulting from this competition (RT9:191). Some existing Gasco customers accepted Gasco's contracts, and they also enjoyed reduced propane prices (RT 7:14-17).

II
THE DISTRICT COURT PROCEEDINGS

The complaint was filed in 1977, asserting violations of Sections 1 and 2 of the Sherman Act, Section 3 of the Clayton Act and various Hawaii statutes. In 1982 petitioner obtained a preliminary injunction restraining Gasco from soliciting petitioner's contract customers (C.R. 184). Thereafter, the court ordered petitioner to desist from misrepresenting the injunction to potential and existing customers (C.R. 246).

Throughout the many years of pretrial proceedings in this case, petitioner's principal contentions were that respondents had violated Section 2 by conducting sham proceedings before DOE and engaging in predatory pricing. At trial, however, petitioner abruptly abandoned those theories and asserted, instead, that the violation of Section 2 consists of (1) HIRI's decision not to invest in and construct a propane recovery unit at its refinery in 1974 and 1975 and (2) "sham" offers of reduced prices to OGS's customers in 1982. (*See* RT1:9-97, 131; RT17:69, 89; RT18:165; C.R. 363, p.7.) As the District Court noted, "the case which was tried was entirely different from the case which was filed" (C.R. 379, p. 8).

The jury returned a verdict in favor of petitioner awarding damages of $4,963,998 ($1,654,666 trebled).

Following the trial, respondents filed a motion for judgment n.o.v. on three separate and independent grounds: (1) that the evidence was insufficient to permit a conclusion that distribution of propane was susceptible to monopolization by PRI-Gasco; (2) that petitioner failed to offer sufficient proof of conduct violative of the standards of competition imposed by Section 2; and (3) that the evidence of injury and damage was too speculative to go to the jury. On June 2, 1986, the District Court, *inter alia*, denied respondents' motions for a judgment n.o.v. and

granted petitioner $873,324 in attorneys' fees (C.R. 358, 359, 362, 372, 379). The District Court's memorandum and order devoted one paragraph to respondents' motion (C.R. 379):

> While the Court had indicated that it might well have found a different result, or at least made inquiry beyond that presented to the jury had the case been tried to the Court, there is substantial evidence to support the jury's verdict. The Motion for Judgment Notwithstanding the Verdict is denied.

III

THE PROCEEDINGS IN THE COURT OF APPEALS

The Opinion issued October 9, 1987, (1) reversed the portion of the judgment based on the refinery modification contention on the ground that respondents had established undisputed efficiency justifications for delay of its refinery modification (App. A, p.10); (2) affirmed the portion based on the 1981 price reductions on the ground that there was "clear and convincing evidence" to support the jury's verdict that respondents' reduced price offers were predatory (*id.*, p.12); and (3) remanded to the District Court to "recalculate" the award of attorneys' fees (*id.*, p.14).

On October 23, 1987, respondents filed a petition for rehearing, contending, *inter alia*, that Gasco's offers of reduced prices above average total cost were lawful, regardless of the existence of predatory intent, in the absence of clear and convincing evidence of an injury to competition (App. E, p.3). Petitioner did not file a petition for rehearing but did file a petition for clarification (App. 1), which urged that the Opinion be "clarified" in two respects: (1) by defining the term "uneconomical" as used in the discussion of the refinery modification issue to mean "unprofitable" and (2) by deleting reference to the "clear and convincing" evidence standard from the discussion of Gasco's 1982 marketing campaign.

On November 27, 1987, the Court of Appeals issued its Amended Opinion, which contains essentially two changes: (1) the discussion of the refinery modification issue is revised to

state, among other things, that the investment required to produce propane in the HIRI refinery would have resulted in a "negative return" in the light of "price controls" and, therefore, was "not economically efficient" (App. B, p.10); and (2) the discussion of the 1982 marketing program was revised to eliminate the clear and convincing evidence standard applied in the Ninth Circuit in predatory pricing cases. The Amended Opinion holds that "sham" or "fraudulent" offers of reduced prices "whose only rationale is a desire to drive rivals out of the market" are illegal under Section 2 and that "the evidence reasonably supported the jury's finding of a predatory rationale" (App. B, p.13). The Amended Opinion does not address, or purport to rule upon, respondents' petition for rehearing.

On February 1, 1988, the Court of Appeals issued its Order and Opinion (App. C). The Order withdraws the earlier two opinions, and the Opinion reverses the judgment below in its entirety. The February 1 Opinion contains an expanded discussion of market power and relevant markets (App. C, pp.8-16), republishes the Amended Opinion's discussion of the refinery expansion issue (App. C., pp.17-20), and reverses the judgment based on the 1982 marketing campaign on the basis of the traditional Section 2 concept that the correct test for predatory conduct arising from offers of prices above average total cost is whether the offers "unreasonably restrict competition" (App. C, pp.21-22).

Subsequent to the issuance of the February 1 Opinion, the Court of Appeals denied respondents' petition for rehearing as moot. Petitioner filed a timely petition for rehearing limited to the issue of the 1982 marketing campaign (App. 2). Consistent with its position on the October opinion, petitioner did not seek rehearing with respect to the refinery expansion issue. Petitioner now seeks to have this Court review the Opinion's analysis of Section 2 conduct *in toto*, claiming that it involves the jury's proper role and function in a Section 2 case.

REASONS FOR DENYING THE WRIT

The Opinion applies settled principles of antitrust law to particular facts. It is highly specific to the particular circum-

stances of the case, which occurred, in part, under the discarded framework of federal regulation over the supply and pricing of propane. The Petition points to no conflict among the Circuits, no issue of antitrust law or important aspect of this particular case that should prompt this Court to entertain a discretionary review.

I

THE QUESTION PROPOSED FOR REVIEW IS VAGUE, FACT SPECIFIC AND DEVOID OF ANY REASON FOR INVOKING THIS COURT'S REVIEW

Petitioner seeks to have this Court review an amorphous, open-ended question, asking (Petition, p.i):

> Given monopoly power in properly defined relevant product and geographic markets, *under what circumstances* can an appellate court determine that the monopolist's conduct is procompetitive as a matter of law and *under what circumstances* must the appellate court abide the fact finder's determination *if supported by substantial evidence?*

This question is so vague as to be meaningless and does not present any issue on which the Circuits are in conflict or any question of overriding importance of statutory interpretation justifying this Court's review. The relevant legal standards for review are set forth in the Opinion,[11] and the Petition does not take issue with them. Rather, the Petition contends that under the circumstances of this particular case the Court of Appeals improperly set aside the verdict of the jury, which, petitioner contends, was supported by substantial evidence. Even if that were so, which it is not, review would entail and require a detailed inquiry into the trial record and would involve only questions of fact and evidence.

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[11] The Opinion states the standards of review, applicable to species of conduct found to violate Section 2 (App. C, p.16):

> These determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of law that we review *de novo*. *Western Concrete Structures Co. v. Mitsui & Company (U.S.A.), Inc.*, 760 F.2d 1013, 1016 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985).

The Petition suggests that by reviewing this case, the Court will be able to draw a bright line between "what monopolistic behavior can be held procompetitive as a matter of law" and "what monopolistic behavior presents for a jury a justiciable fact issue" (Petition, p.12). This suggestion simply does not bear analysis. The two courses of conduct that were here challenged to be in violation of Section 2 are well within the zone conceded by the Petition to be "permissible acts even if done by a monopolist" (Petition, p.12).

The first was the decision of HIRI about the timing of "entry" into the "market" of manufacture and wholesale of propane, which is a market concededly not dominated by respondents (App. C, p.20). Consistent with the Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), the lower federal courts have refused to second-guess even a monopolist's decisions about the timing of market entry. *E.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979) *cert. denied* 444 U.S. 1093 (1980) ("Any firm, even a monopolist, may generally bring its product to market whenever and however it chooses. . . ."); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) ("Without more, it is not unlawful for any competitor in any market to delay the introduction of a new product or an entire line of new products until . . . the competition forces such introduction."). And a related line of cases holds that a monopolist may make product changes justified by efficiency. *E.g., California Computer Products, v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979) (Cost-justified changes in product design "did not present a jury issue."). *Compare, Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), where the Court upheld a verdict for the plaintiff based on conduct by a monopolist *cancelling* a long-standing market relationship, which effected an "important change" in the character of the market, on the ground that there was *no* business justification (*id.* at 604-5). Here, the Court of Appeals refused to permit the jury to second-guess HIRI's decision not to invest in propane manufacturing facilities *when propane production was economically inefficient* and when the decision left the existing retail propane markets and supply

relationships exactly as they were. Rather than challenging the formulation of the permissible conduct, the Petition (16-20) quibbles with the Court of Appeals' analysis of the economic facts of record.

The second course of challenged conduct was Gasco's 1982 marketing program, consisting of offers of reduced prices above average total cost to high volume propane consumers. Economic theory and reported decisions suggest that price-cutting in this range presents no danger to competition and consumer welfare. *E.g.*, Areeda, P. & Turner D., III Antitrust Law ¶ 714 (1978 ed.) and ¶ 711.1 (Suppl. 1987); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056 (6th Cir.) *cert. denied*, 469 U.S. 1036 (1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-36 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981); *MCI Communic. Corp. v. AT&T*, 708 F.2d 1081, 1111-1123 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Southern Pacific Communic. Co. v. AT&T*, 740 F.2d 980, 1005 (D.C. Cir.), *cert. denied*, 470 U.S. 1005 (1984) (conclusive legality for prices above average cost is "relatively uncontroversial"); *see also Matshushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."); W. Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matshushita*, 61 Notre Dame L. Rev. 1052 (1986).[12] Again, the Petition does not challenge the rule of law applied but argues that the Court of Appeals has incorrectly concluded that Gasco's price reductions did no injury to competition.

The Petition in effect suggests that this Court review every appellate decision arising under Section 2 of the Sherman Act to assure that the Court of Appeals correctly analyzed the facts and did not invade the province of the jury. Such a review is not a

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[12] In the Ninth Circuit price reductions above average total cost are predatory only if injury to competition is demonstrated by clear and convincing evidence. *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1387 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

suitable exercise of this Court's discretionary jurisdiction. *United States v. Johnston*, 268 U.S. 200, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

II

THE COURT OF APPEALS FOLLOWED TRADITIONAL SECTION 2 ANALYSIS AND CORRECTLY REJECTED PETITIONER'S ABERRANT LEGAL CONTENTIONS

A review of the Opinion below discloses a proper disposition of the case. The appellate court cited and followed the proper standard for review of a jury verdict on a j.n.o.v. motion. It also properly applied mainstream Section 2 principles.

As noted above, petitioner's disagreement with the Opinion is in its application of settled law to the specific facts of this case. Beyond that, the Petition addresses a general lament about the development of law under Section 2 and invites this Court to undertake a reversal of field, starting with this fact-specific case.

A. Section 2 Does Not Require Manufacture Of An Inefficient New Product

As stated above, petitioner's theory of the case, based upon a presumed obligation by respondents to invest in refinery improvements for the benefit of petitioner, was advanced on the eve of trial. It is unprecedented and contrary to the principles of competition underlying the antitrust laws. It should have been rejected by the District Court, and reversal by the Court of Appeals did not even present a close question.[13]

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[13] Petitioner's show of indignation here is somewhat suspect in the light of the failure below to raise the issues here presented in a petition for rehearing. Rather, in its motion for clarification petitioner simply requested the Court to specify that the refinery construction would have been uneconomic because "unprofitable." There was no suggestion of an evidentiary controversy about such a conclusion, and petitioner's subsequent petition for rehearing (App. 2) does not mention the refinery modification issue.

In attacking that reversal here, petitioner erroneously portrays the Opinion below as relying solely on the business "acumen" exception referred to in *United States v. Grinnell*, 384 U.S. 563, 571 (1966). The Opinion also cites and relies upon the cases, cited p.19 *supra*, holding that a monopolist may decide when to bring a product to market and upon *Aspen Skiing Co., supra*, and other cases holding that conduct justified by "efficiency" is generally exempt from further Section 2 scrutiny. All of these cases support the conclusion of the Court of Appeals that respondents were not required by Section 2 to begin manufacture of a new product to assist petitioners, particularly when there is an efficiency justification for not doing so.

Petitioner's argument below was based on a misguided extension of *Aspen Skiing* and an effort to find support in a line of supply restriction cases. The Court of Appeals' analysis is entirely consistent with those cases, none of which supports petitioner's argument.

The basic problem with both analogies is that respondents were not engaged in the *production of propane* and had no conceivable monopoly power in the wholesale propane market. Respondents' alleged market power was at the next level, retail distribution.[14] In contrast, the monopolist in *Aspen Skiing* exercised monopoly power in the same market (the supply of ski lift tickets) from which plaintiff was excluded. Similarly, in the supply restriction cases, monopoly power was exercised in the market in which supply was restricted. This basic distinction is relied upon by the Opinion below.[15]

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[14] The Opinion (App. C, 12) expresses doubt about the correctness of the jury's finding that Gasco exercises monopoly power in a relevant market for retail distribution of propane.

[15] "A theory of liability based on 'supply restriction' must fail because Pacific Resources had no monopoly power over supplies of propane to Hawaii. Chevron produced all Hawaiian propane until 1982. Contrary to Oahu's argument, the regulatory scheme in place in the 70's did not give Pacific Resources control over propane supplies. Oahu appealed to the Department of Energy for larger

Aspen Skiing does not support petitioner's theory for a second important reason. The monopolist in that case, as Justice Stevens' Opinion carefully notes (475 U.S. at 603), did not merely refuse to enter into "a cooperative venture" proposed by a competitor. "Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." (*Ibid.*) Here, HIRI's election not to commence manufacture of propane made no change whatsoever in the pattern of distribution or competitive market. *Compare, Olympic Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-76 (7th Cir. 1986) *cert. denied*, 1075 S.Ct. 1574 (1987) (" 'There is a difference between positive and negative duties, and the antitrust laws, like other legal doctrines sounding in tort, have generally been understood to impose only the latter.' *USM Corp. v. SPS Technologies Inc.*, 694 F.2d 505, 512-13 (7th Cir. 1982).").

The fundamental tenet of the Opinion on this issue is that here, unlike *Aspen Skiing*, as a matter of law there was an efficiency justification for delaying investment in the propane unit. This justification was created by the price control regulations imposed by the federal government on the manufacture of propane at a time when HIRI was evaluating proposed refinery modifications.[16] After consulting with DOE and concluding that HIRI would be tied to Chevron's pricing under the DOE New Item Rule and that the investment in a propane unit would produce a negative return, HIRI deferred investment in the propane recovery unit until after price controls of propane were discontinued in early 1981. As stated in the Opinion (App. C, p.18), "in light of

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allocations of propane, and it was ultimately successful." (App. C, p.20.)

[16] The regulatory scheme for propane and natural gases was different under the regulations from that applicable to gasoline. Because propane is a heating fuel essential in remote areas and has special importance in drying crops, there were special concerns about maintaining a lower price. *See Mobil Oil Corp. v. Federal Energy Admin.*, 566 F.2d 87, 94-97 (TECA 1977). Thus, it was profitable to manufacture gasoline, but not propane. *See Oahu LP Gas Service, Inc.* 2 FEA ¶ 85,009 at 85,002 (Feb. 11, 1975); *Standard Oil Co. of Calif.*, 2 FEA ¶ 80,618 (June 26, 1975).

the then-existent price controls, it was not economically efficient" to produce propane. Hence, "as a matter of law," respondents' "decision to refrain from producing propane because it was not economically efficient is sufficient justification to preclude anti-trust liability" (*id.* at p.20).

The Petition suggests that the Court of Appeals was obligated to go beyond respondents' prima facie evidence of efficiency justification and "ensure" that the justification for the delay in refinery modification had "the net effect of producing better products at lower prices or otherwise benefiting consumers" (Petition, p.19). This assertion is contrary to this Court's statement in *Aspen Skiing* that any valid business justification for the exclusionary conduct would exonerate it from further Section 2 scrutiny (472 U.S. at 605).[17] It is axiomatic that demonstration of efficiency justification will tend to confer economic benefits on consumers and result in better products and lower prices. Here, HIRI was a new entrant into the refining market in competition with Chevron. Decisions designed to avoid money-losing products would tend to greater efficiency and competitiveness in the market for other products.

Petitioner points to the evidence that Gasco imported propane at a higher cost than domestic propane and that the refinery

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[17] Judge Pierce rejected a similar contention in *GAF Corp. v. Eastman Kodak Co.*, 519 F.Supp. 1203, 1231-32 (S.D.N.Y. 1981), that Kodak could be liable under Section 2 for failure to market in the United States a film being sold by Kodak in other countries, stating as follows:

> To create the possibility that treble damages might be awarded on the basis of a finding (made with the benefit of hindsight) that a firm's failure to introduce a product was anticompetitive would impose a significant chilling effect on innovation and research not envisioned by § 2. . . . The chilling effect on innovation would encourage the very industrial sluggishness the Sherman Act was designed to prevent. Notably, so far as this Court is aware, no court has yet found a monopolist's failure to market a product as satisfying § 2's conduct requirement.
>
> Secondly, . . . the ability of the judicial system to determine whether a product should have been marketed, and, if so, when is severely limited . . . .

modification cost more in 1982 dollars than it would have cost in 1973 dollars, and speculates that HIRI's investment decision may not have been in the *long-run* combined economic interests of HIRI-PRI-Gasco, but petitioner offered no demonstration to the courts below to substantiate the truth of its speculation. If petitioner's speculation were accepted as true, it is nonetheless irrelevant. The essence of predation is action taken that is not profit-maximizing in the short run and that depends on long-run recoupment through future monopoly pricing to make it rational economic behavior. *See Matshushita, supra*, 475 U.S. at 588-89. It is perverse for petitioner to argue that a decision not to invest in propane production equipment is predation in violation of Section 2 because the investor thereby maximized short run profits at the expense of unpredictable, uncertain long run benefits. *See generally*, F. Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972 (1986). Moreover, interjecting retrospective review of events subsequent to the conduct in question as an element of the test for liability would arbitrarily punish decision makers with treble damages, would distort investment decisions and deter investment and would invite antitrust defendants to argue that adjudication of classic predatory acts should await excuse through evaluation of their long-run effects. In short, petitioner advances an aberrant, erroneous theory.

B. Section 2 Does Not Prohibit Price Reductions Above Average Total Cost In The Absence Of Injury To Competition

The 1982 marketing campaign was also adequately addressed by the Opinion below. Under proper j.n.o.v. standards the Opinion finds that the parties did not dispute that the price levels of the offers were above Gasco's average total cost (App. C, pp.7, 21).[18] The Opinion accepts petitioner's contention that the jury found that the offers were insincerely made for the purpose of inducing OGS to lower its prices and were for that reason "shams" (*ibid*) and then addresses petitioner's contention that sham offers at levels above average total cost are predatory conduct under

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[18] Petitioner also remained profitable under the new prices. Ex. 662 shows petitioner's pretax profit per gallon to be 1980-12.05¢, 1981-17.64¢, 1982-15.48¢, 1983-15.58¢.

Section 2. The Opinion concludes that there was no evidence of an injury to competition from Gasco's offers and that the resulting reduced prices to OGS's customers were, if anything, procompetitive (*id.*, p.22-25).[19] Applying the antitrust axiom that anticompetitive intent alone does not establish predatory conduct and refusing "to turn our back on a large body of case law" (App. C, p.22) requiring injury to competition for Section 2 liability, the Court of Appeals reversed the judgment below on the ground that Gasco's offers were not illegal under Section 2 as a matter of law.

The Petition argues that the change of position by the Court of Appeals between its vacated October 9, 1987 Opinion and November 27, 1987 Amended Opinion and the final February 1, 1988 Opinion is "unexplainable" (Petition, p.20). In fact, the change is readily explained by the sequence of events described above (pp.9-10). The first Opinion erroneously held that the jury had found that Gasco's conduct amounted to predatory pricing under the clear and convincing evidence standard that governs price reductions above average total cost in the Ninth Circuit.[20] Inasmuch as the jury had been given no such instruction because OGS contended that this is not a predatory pricing case, petitioner's petition for clarification requested that the Opinion be modified by elimination of the clear and convincing evidence standard (App. 1, pp.3-4). The November 27, 1987 Amended Opinion was in fact so modified and was thereby rendered facially erroneous under traditional Section 2 analysis because respondents' conduct patently caused no injury to competition. The final Opinion corrected this error and, belatedly perhaps, reached the

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[19] Petitioner's argument that it could have made more profits by maintaining its high prices and pouring the profits back into expanding its business is not evidence of anticompetitive effect. Every business is presumed to have a limitless desire for higher profits and to grow and to evolve as a business. However, the fact that events in the marketplace may place some limits on the desires of OGS does not make those events of concern under the antitrust laws where the focus is on injury to competition and not on injury to a competitor. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 492 (1986).

[20] *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1388 (9th Cir. 1983).

correct conclusion that even a monopolist is entitled to engage in price reductions, so long as there is no injury to competition. *Cargill, Inc. v. Montfort of Colorado, Inc.*, 479 U.S. 104, 107 S.Ct. 484, 492 (1986); *Drinkwine v. Federated Publications, Inc.*, 780 F.2d 735, 739 (9th Cir. 1985), *cert. denied* 106 S.Ct. 1471 (1986); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377, 1388 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981) *cert. denied*, 459 U.S. 825 (1982); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 740-47 (9th Cir. 1979); *Olympia Equipment Leasing Co. v. Western Union & Tele. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) *cert. denied* 107 S.Ct 1524 (1987); *Cf. Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

CONCLUSION

There is no issue of the role and function of the jury in monopolization cases here worthy of review by the Court. The Court of Appeals applied conventional Section 2 principles and standards of appellate review. Its garden-variety reversal of denial of a j.n.o.v. motion in a Section 2 case does not merit this Court's attention. The petition for a writ of certiorari should be denied.

Dated: July 21, 1988.

Respectfully submitted

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APPENDIX 1

No. 86-2250

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,

VS.

PACIFIC RESOURCES, INC. and CASCO, INC.
Defendants-Appellants.

APPELLEE'S PETITION FOR CLARIFICATION

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The Court's decision in *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, slip. op. 86-2250 (October 9, 1987) constitutes an important new precedent in Section 2 antitrust case law. This opinion will undoubtedly be looked to by lower courts in determining what conduct, when taken by a monopolist, violates the Sherman Act. It is essential, therefore, that its holding be clearly delineated. Accordingly, without seeking to affect the result reached, the appellee Oahu Gas Service, Inc. ("OGS") respectfully calls to the Court's attention two aspects of its opinion which merit further clarification.

1. *Clarification of the term "uneconomical"*

In its discussion of the appellants' decision not to expand its refinery, the Court observed that "[b]ecause producing propane would have been uneconomical at the time, Pacific Resources' decision to forego propane production did not exclude competition unnecessarily." *Id.* at 9. *See also id.* at 9 n.2, 10 (use of term "uneconomical"). The term "uneconomical," however, is not defined.

Accepting the Court's decision that the monopolist's duty to cooperate with a competitor is vitiated where the cooperation in "uneconomical," *id.* at 10, there is a real need to delineate carefully what is encompassed within that term. Clearly, a sweeping definition of "uneconomical" to embrace *any* reduction of revenues or profits would emasculate the Court's basic holding that in some cases "the antitrust laws impose what may be characterized as affirmative duties." *Id.* at 9. Seldom, if ever, will cooperating with a competitor be completely without cost. In the usual case, curtailment of conduct unnecessarily restrictive of competition will result in the monopolist having to forego at least some opportunity for increased sales and increased profits. As the Supreme Court acknowledged in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847 (1985), such lost revenues and profits cannot constitute a business justification sufficient to save a non-cooperating monopolist from liability. *Id.* at 2852.

Unfortunately, if not clarified, the term "uneconomical" may be construed by lower courts to encompass *any* diminution of a monopolist's revenues or profits, thus vitiating the rule of *Aspen* and rendering this Court's notion of a monopolist's affirmative duties a nullity.

OGS, therefore, respectfully requests the Court to specify that "uneconomical" means "unprofitable." Such a definition comports with the appellants' contentions as to the reasons why it postponed construction of its propane refinery. *See* Appellants' Opening Brief at 9. *See also* RT 13:101-102 (the refinery investment would have produced a "negative return.") Defined as "unprofitable," the term "uneconomical" encompasses the particular facts of this case and provides lower courts with a specific guide with which to assess the scope of permissible conduct for a monoplist.

2. *Deletion of the opinion's 'clear and convincing' language*

In its opinion, the Court stated that "a plaintiff in Oahu's position must show by clear and convincing evidence that the defendant's *pricing policy* had a predatory rationale." *Id.* at 12. (Emphasis added.) In that same paragraph, however, the Court observed that the relevant evidence was not the prices Gasco offered but rather the contracts themselves. *Id.* Thus, the conduct challenged in this litigation and found actionable by the Court was *not* Gasco pricing practices, but instead its offer of sham contracts.

The clear and convincing standard articulated in *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1193 (9th Cir. 1984), *cert. denied,* 469 U.S. 1213 (1985), has been reserved for those cases where the challenged conduct involves the level at which the defendant has set its prices, *i.e.*, its pricing policy. *See also Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied,* 464 U.S. 955, 104 S.Ct. 370 (1983).[1] OGS knows of no case, however, where this heightened standard was applied to non-predatory pricing cases where consumer benefits from lower prices are not implicated.

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[1] The Court limited its holding to cases where the alleged predatory price is above defendant's average total cost:

> "Therefore, it is appropriate to impose on the plaintiff a greater burden of proving that prices above average total cost are predatory than the burden imposed by *Inglis* to prove that prices between average variable and average total cost are predatory. We therefore hold that if the challenged prices exceed average total cost, the plaintiff must prove by clear and convincing evidence—i.e., that it is highly probably true—that the defendant's pricing policy was predatory." 698 F.2d at 1388.

While OGS agrees with the Court's finding that Gasco's 1982 Marketing Campaign constitutes "clear and convincing" evidence, it does not agree that this modestly more stringent standard of proof should be extended to non-predatory pricing cases. Instead, OGS urges the court to reserve that standard of proof for cases where the defendant's pricing policies constitute the essence of the Section 2 offense. As this is not such a case, OGS respectfully asks the Court to delete the requirement of "clear and convincing" evidence set forth in its opinion.[2]

Dated: October 22, 1987

Respectfully submitted,

By /s/ MAXWELL M. BLECHER
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Oahu Gas Service, Inc.

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[2] Additionally OGS respectfully calls the Court's attention to a factual inaccuracy in the opinion which should be amended. On page 8 of the slip opinion the Court states: "The jury could reasonably have concluded that Oahu's success in capturing a significant market share on Oahu may have been due to the 'insider' status of its founder, once an executive with Gasco, who took some large accounts with him when he left Gasco." The last clause of this sentence is incorrect. Although OGS' President, James Frandsen had been employed by Gasco prior to founding the new company, he did not take any accounts with him when he left. Approximately one year elapsed between the time Mr. Frandsen left Gasco and when OGS began delivering to customers. OGS, in fact, did not even solicit customers until mid-1972, over half a year after leaving Gasco. While it is true that because Gasco had 100% monopoly of the Oahu propane market all of OGS' customers were former customers of Gasco, it was not contended by either party on appeal that Frandsen took customers with him when he left his former employ. More accurately, Mr. Frandsen's long years in the propane business in Hawaii and his intimate familiarity with that business facilitated OGS' entry into the propane market. The unintended implications of the Court's misstatement that Mr. Frandsen somehow misappropriated customers from his former employer is not consistent with the record presented on appeal. OGS, therefore, respectfully requests this Court to amend this statement striking the last clause.

APPENDIX 2

No. 86-2250
(USDC Hawaii: Civil No. 77-0444)
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OAHU GAS SERVICE, INC.,
Plaintiff-Appellee,
vs.
PACIFIC RESOURCES, INC. and GASCO, INC.,
Defendants-Appellants.

PETITION FOR REHEARING
WITH SUGGESTION OF REHEARING EN BANC

I

STATEMENT OF COUNSEL

Oahu Gas Service, Inc. ("OGS") respectfully petitions the Court for reconsideration of the opinion filed on February 1, 1988. In abruptly reversing its two prior rulings, the Court adopted in material part the arguments asserted by defendants Pacific Resources, Inc. ("PRI") and Gasco, Inc. ("Gasco") in their October 27, 1987 petition for rehearing. OGS, however, was not afforded an opportunity to respond to the factual and legal contentions presented in defendants' petition. OGS, therefore, now seeks an opportunity to reply.

OGS specifically seeks rehearing on that part of *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, No. 86-2250, slip. op. (9th Cir. February 1, (1988) ("*OGS III*") that addresses Gasco's 1982 marketing campaign against OGS. In early 1982, Gasco implemented a plan to approach OGS customers with offers of prices substantially below those contained in the customers' existing long-term contracts with OGS. In making these offers, "Gasco's true goal was not to attract customers," but rather to force its smaller rival to lower significantly the price terms of its existing contracts. *OGS III* at 1275 ("true goal was . . . to cut into Oahu's profits."). OGS, faced with Gasco's sudden, intense and repetitive overtures to its customer base, responded by renegotiating many

contracts mid-term. By lowering the prices contained in these contracts, OGS was able to retain its customers, but lost over $400,000 in revenues as a result.

The Court, while acknowledging that Gasco's conduct in interfering with OGS' customers "smacks of unfair competition," held that absent proof of anticompetitive effect such conduct did not violate Section 2. *Id.* at 1276. Defining such anticompetitive effect as "the transfer of resources or patronage away from the rival and to the monopolist," the Court concluded that no such anticompetitive effect had been shown. *Id.* at 1277.

OGS respectfully requests reconsideration of the Court's finding that Gasco's 1982 marketing program resulted in no anticompetitive effect on two grounds:

(1) OGS respectfully submits that the Court's requirement that anticompetitive effect be shown by a diversion of resources or customers from the rival to the monopolist is unduly restrictive and inconsistent with the case law of this Circuit;

(2) Applying the appropriate analysis of anticompetitive effect, OGS respectfully submits that there was evidence sufficient to support the jury's inference that Gasco's 1982 marketing program in fact diminished competition in the Hawaiian propane market. In holding to the contrary, the Court has overlooked substantial evidence supporting the jury's finding.

II

ARGUMENT

A. The Court's Definition Of Anticompetitive Effect Is Too Restrictive.

The Court's reversal of its previous position regarding the illegality of Gasco's 1982 marketing campaign is grounded in its belief that, although reprehensible and arguably tortious, the defendants' conduct resulted in no proved anticompetitive effects.[1] *Id.* The Court notes that the net effect of Gasco's sham offers was merely a lowering of OGS' prices—an inference based

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[1] It is well-established that competitive torts, when used to achieve or maintain a monopoly, fall within the ambit of the Sherman Act. Boone, "Single Corporation Competitive Torts and the Sherman Act," 2 *Ga. L.*

on the testimony that Gasco did not obtain OGS customers as a result of its marketing program. *Id.* at 1275-76. Thus, the opinion reasons, because the plaintiff could not demonstrate that the defendants' conduct resulted in a diversion of resources or customers from OGS to the monopolist, it could not satisfy Sections 2's requirement of provable anticompetitive effect. *Id.* at 1277. Citing the oft-quoted aphorism that antitrust laws protect competition and not competitors, *OGS III* rejects plaintiff's claim of antitrust injury and reverses the jury's verdict. *Id.* at 1276-77.

To require an antitrust plaintiff to prove either a transfer of resources or patronage in order to establish anticompetitive effect, however, is both unjustified and contrary to existing authority. The inquiry into anticompetitive effect is singularly fact-based. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983). *See also Hasbrouck v. Texaco, Inc.*, 830 F.2d 1513, 1519 (9th Cir. 1987). Thus, it is not susceptible to a characterization as a matter of law as suggested by *OGS III*. Rather, the requirement of anticompetitive effect mandates that the plaintiff demonstrate, based on the factual attributes of the market and the particular conduct at issue, that the vigor of marketplace rivalry, as opposed merely to the health of individual rivals, has been impaired. *See Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 97 S.Ct. 690, 697 (1977).

That the focus is on competition, as opposed to individual competitors, however, does not mean that the harm incurred by an individual rival is eliminated from the analysis. To quote from a recent Ninth Circuit opinion:

> The oft-quoted chestnut distinguishing between protecting competition and protecting competitors has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant. The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that

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Rev. 372, 374 (1968) *See also* L. Sullivan, *Handbook of the Law of Antitrust*, 112-13 (1977).

> harm competitors harm competition. However, the converse is not true. *Injury to competition necessarily entails injury to at least some competitors.* Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

Hasbrouck, 830 F.2d at 1518 (emphasis added).

Antitrust plaintiffs in the Circuit and in others have demonstrated anticompetitive effect in a myriad of ways. For example, proof that the defendant's conduct has resulted in a diversion of resources or customers away from the rival and to the monopolist may evidence that the defendant's conduct has actualiy lessened competition. *See Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013, 1018 (9th Cir.), *cert. denied*, 474 U.S. 903 (1985); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 556 (7th Cir. 1980). Such a showing, however, is not the only way to demonstrate anticompetitive effect. Other recognized indicia of anticompetitive effect include: raised barriers to entry as a result of defendant's conduct (*Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317, 1322 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976); *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)); increased costs incurred by a rival because of the monopolist's actions (*Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1296 (9th Cir. 1984), *cert. denied*, 469 U.S. 1190 (1985); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983)); and lost profits incurred by a plaintiff due to the defendant's manipulation of otherwise competitive prices (*Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 856-57 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 807 (8th Cir. 1987).)

Notably, these latter three manifestations of anticompetitive effect do not require that the monopolist be the direct beneficiary

of its rival's lost patrons or revenues. In these situations, the defendant's reward is indirect. By impairing the ability of a rival to challenge its monopoly, the defendant reduces competition in the relevant market despite the fact that no sales or customers are diverted to it.

OGS III, by rejecting any indicia of anticompetitive effect absent proof of a diversion of resources or customers away from the rival, overlooks the substantial body of authority mandating a broader viewpoint. As established in *Brunswick*, it is not necessary for an antitrust plaintiff to demonstrate an actual lessening of competition in order to recover. *Brunswick*, 429 U.S. at 489 n. 14, 97 S.Ct. at 698 n. 14. *See also Lee-Moore Oil Co. v. Union Oil Co.*, 599 F.2d 1299, 1304-05 (4th Cir. 1979).

OGS III's holding that only those anticompetitive effects resulting in direct and provable benefits to the monopolist satisfy Section 2 is not only impermissibly restrictive but it also directly contradicts the well-established rule requiring a plaintiff to mitigate its loss. *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 436 (5th Cir. 1977). This tension is demonstrated by the facts presented in this case. Gasco approached OGS' customers with sham offers. OGS had two choices: it could either stand idly by and see how many customers would be drawn away by Gasco; or, it could seek to mitigate its loss by lowering its contractual price terms and by seeking a temporary injunction to halt Gasco's interference. Had OGS chosen not to respond at all, it is likely that it would have lost customers and even gone completely out of business. Ironically, such dramatic losses would satisfy *OGS III*'s rigid definition of provable anticompetitive effect. OGS' ability to recover for these direct effects, however, would have been vitiated by a claimed failure to mitigate. Conversely, by choosing to mitigate those losses caused by the monopolist and enabling itself to survive, OGS became ineligible for recovery under the narrow anticompetitive effect requirement of *OGS III*. To create such a catch-22 for the victims of predation by a monopolist is wholly inequitable and requires, plaintiff respectfully submits, reconsideration by this Court.

B. OGS Adduced Ample Evidence from Which the Jury Could Reasonably Infer that Gasco's Conduct Caused Anticompetitive Effects

Once the analysis of anticompetitive effect is recognized to include consideration of conduct which impairs competition without directly transferring resources to the monopolist, it is apparent that the jury could reasonably infer that Gasco's 1982 marketing strategy negatively impacted both OGS and competition in the Hawaiian propane market.[2] Specifically, the jury could have reasonably inferred that the purpose and effect of Gasco's conduct, *i.e.*, reducing OGS' revenues, resulted in both a lessening of competition in Oahu and the absolute prohibition of competition in the Neighbor Islands.

1. Gasco's Conduct Reduced Competition in Oahu

An assessment of anticompetitive effect requires an examination of the market in which the defendant's conduct occurred. *See Kaplan*, 611 F.2d at 291. The propane market in Oahu consisted essentially of two competitors—Gasco and OGS. Until OGS' entry in 1972, Gasco was the sole supplier of propane in Hawaii. *OGS III* at 1259. Other than OGS, there were no other competitors in the Oahu market who could realistically challenge Gasco's position.[3] *Id.* at 1269. In addition, OGS proved that entry barriers in this isolated marketplace were high, thus permitting a reasonable inference by the jury that were OGS' competitive viability to be significantly impaired, no other rival would be likely to enter the Oahu market to take its place. *Id.*

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[2] In order for this Court to reverse the jury's finding on this issue, it must conclude that the plaintiff failed to adduce sufficient evidence from which a reasonable mind could infer that Gasco's marketing program had a negative effect upon competition. *See California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 733-34 (9th Cir. 1979).

[3] The jury could reasonably infer that a third supplier of propane, Aloha Gas, did not qualify as a viable challenger to Gasco's monopoly. (T.R. 14:109-10.) Aloha's market share was less than one-tenth of one percent (Ex. 1318), a fact which even *OGS III* acknowledges supports plaintiff's contention that Aloha's presence did not evidence a breakdown of entry barriers in this market. *OGS III* at 1269.

Given an Oahu market occupied by only two rivals, the jury could reasonably infer that any program undertaken to eliminate or handicap OGS would inevitably result in a reduction in competition. *See, e.g., D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982); *Helix Milling*, 523 F.2d at 1320. *See also H. J. Heinz Co. v. Beech-Nut Life Savers, Inc.*, 181 F.Supp. 452, 464 (S.D.N.Y. 1960) (recognizing the anticompetitive effect inherent in eliminating or crippling one of only three competitors in market.)

So too could the jury infer, based on substantial evidence, that the purpose and actual effect of Gasco's campaign was to cripple its only effective rival. As shown by the testimony, the purpose of Gasco's 1982 campaign was to lessen the revenues and profits of OGS. (Ex. 1161) (T.R. 2:199). "Where, as here, the defendants have acted with intent to eliminate competition, the proof of resulting injury need not be overwhelming." *D & S*, 692 F.2d at 1249. Also in the trial record is the fact that OGS lost over $400,000 in revenues as a result of Gasco's conduct. The jury was entitled to infer that had these revenues been available, OGS would have been able to finance a variety of activities, such as inprovements in its plant and equipment, expansion of its customer base or enhancement of services offered to its customers. A reasonable jury could permissibly infer, therefore, that Gasco's depression of OGS' revenues and the attendant prohibition of these activities effectively diminished the vigor of competition in the Oahu marketplace.

2. Gasco's Conduct Eliminated Competition in the Neighbor Islands

In addition, the jury could have reasonably inferred that Gasco's reduction of OGS' revenues resulted in provable anticompetitive effects in the Neighbor Islands. At the time it planned the 1982 Blitz, Gasco knew that OGS was positioned to expand to the outer islands. (T.R. 2:187-88.) One of the stated goals of Gasco's campaign, in fact, was to prevent OGS from obtaining the revenues necessary to finance such entry. (Ex. 1161.) In addition, the jury heard testimony that between 1982 and 1985 OGS did not enter the Neighbor Islands. (Ex. 1318) (T.R. 9:192). From this evidence, the jury could reasonably infer that Gasco's reduction of OGS' revenues had the effect of

eliminating OGS as a potential competitor on the Neighbor Islands. Such an elimination of competition satisfies even the most stringent definition of cognizable anticompetitive effect. *See Western Concrete Structures,* 760 F.2d at 1018.

Based on the testimony regarding the structural dimensions of the Hawaiian propane market, and the evidence regarding the purpose and actual negative effect of Gasco's sham offers on OGS, it was wholly reasonable for the jury to infer that Gasco's infliction of financial loss of OGS necessarily translated into a diminution in competition. The marketplace at issue in this case was not one populated with rivals so that the loss or handicapping of a single competitor would not adversely impact competition. Rather, it was a two-competitor marketplace in an isolated geographic area with little or no possibility of further entry. *OGS III* at 1269. Given the facts of this particular market, the jury could reasonably conclude that injury to a competitor was synonymous with injury to competition.[4]

III

CONCLUSION

For all the foregoing reasons, we respectfully request that the petition be granted and that rehearing beheld by the Court sitting en banc.

Dated: February 16, 1988

Respectfully submitted,

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[4] While it is arguable that the jury could have alternatively inferred that OGS' injury as a competitor did not result in a lessening of competition, it is not for this Court to substitute inferences where, as here, the plaintiff has adduced sufficient evidence to support the jury's conclusions. *Los Angeles Memorial Coliseum Commission v. National Football League,* 726 F.2d 1381, 1392 (9th Cir.), *cert. denied sub nom. National Football League v. Oakland Raiders, Ltd.,* 469 U.S. 990 (1984).